IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 15773

PACIFIC GAS & ELECTRIC COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent,

SIERRA PACIFIC POWER COMPANY,
Intervener.

MEMORANDUM IN REPLY TO PETITIONER'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS PETITION FOR LACK OF JURISDICTION

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In the "Points and Authorities" contained in the memorandum of petitioner (PG&E) filed in opposition to the motions filed by the intervener (Sierra) and the respondent Federal Power Commission (the Commission) to dismiss the petition to review herein, PG&E argues first that the question of the circuit in which a petition to review an administrative order may be brought is one of venue and not of jurisdiction. Secondly, in an effort to distinguish the *Hicks* and *Morris* cases, PG&E argues that the Commission's order sought to be reviewed herein

was issued pursuant to the mandate of the Supreme Court (*FPC* v. *Sierra Pacific Power Co.*, 350 U. S. 348 (1956)) and not the mandate of the Court of Appeals for the District of Columbia Circuit (*Sierra Pacific Power Co.* v. *FPC*, 223 F. 2d 605 (D.C. Cir. 1955)), and that it deals with entirely different issues of fact and law than did the earlier order which was set aside by those courts.

I

The issue here is one of jurisdiction and not of venue.

PG&E's contention as to venue is readily disposed of: while it is true that the initial choice of the circuit in which to review administrative proceedings is a matter of venue, the law is clear that after one circuit has taken jurisdiction, its jurisdiction is exclusive, and extends to a review of an order issued pursuant to a remand issued on the initial review. We think this is amply illustrated by our citation of the *Hicks* and *Morris* cases in our Points and Authorities.

PG&E seeks to distinguish the *Morris* case on the narrow and technical ground that there a mandate of a court of appeals was involved while in the case at bar the mandate of the Supreme Court is involved; and to bolster that meaningless distinction with the argument that the District of Columbia Circuit is no better equipped than this Court to decide the issues presented by this appeal. As to the supposed ground of distinction, to meet technicality with technicality, it is necessary only to point out that it *is* the mandate of the District of Columbia Circuit which must be construed in this appeal and on that point the *Morris* case is entirely clear and unequivocal:

> "We cannot believe that an appellate court of another jurisdiction can determine whether a mandate of the appellate court first acquiring jurisdiction was properly followed." (116 F. 2d at 898)

With respect to the argument that the District of Columbia Circuit is not better prepared to determine the issues on this appeal than is this Court, we refer the Court to the annexed affidavit of William C. Chanler from which it is apparent that all the issues in controversy under the petition to review involve conflicting contentions as to the effect and construction of the proceedings before the District of Columbia Circuit as they may be affected by the proceedings before the Supreme Court. Sound judicial administration, as well as the clear law of the *Morris* case, require this appeal to be heard by the District of Columbia Circuit.

PG&E's attempt to distinguish the *Hicks* case is again a technical and narrow one. Its argument is simply this: the *Hicks* case involved two appeals from the same administrative order; this case involves two administrative orders; therefore the *Hicks* case does not apply. Neither the facts of this case nor the meaning of the *Hicks* case is as simple as that. The Supreme Court clearly held in the case at bar that determinations under Sections 205 and 206 of the Federal Power Act would both be parts of the same proceeding. Indeed, the order here sought to be reviewed is based in part on the record made in the proceeding already reviewed by the District of Columbia Circuit. And the meaning of the *Hicks* case (quoted at page 13 of our Points and Authorities) is clearly that the court of appeals first taking jurisdiction of part of an administrative proceeding thereby acquires exclusive jurisdiction over all parts of that proceeding.

It is clear that the District of Columbia Circuit, having first acquired jurisdiction of part of this controversy, has thereby acquired exclusive jurisdiction of the entire controversy and is the only forum that can hear this appeal. No other conclusion would be compatible with efficient judicial administration and the intent of Congress. As the Court of Appeals for the Second Circuit expressly pointed out in the *Morris* case, "The appeal taken * * * from [the first Commission] order * * * gave the first circuit 'exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part' * * *. *We cannot doubt that it has exclusive jurisdiction to determine the character of the order to be entered upon its mandate*" (116 F. 2d at 898). (Italics added.)

II

It is clear from the history of the litigation out of which the present petition arises that the order here sought to be reviewed arises from the mandate of the Court of Appeals for the District of Columbia Circuit as affirmed in slightly different form by the Supreme Court of the United States, and that the issues on this appeal relate exclusively to a construction of that mandate and of the opinions of the Court of Appeals and Supreme Court in the prior proceedings.

Because of the aforementioned points raised by petitioner in its memorandum regarding the nature and origin of the order under review, it became necessary for counsel on the oral argument to outline the history of the litigation, and in doing so, to go somewhat beyond the record presently before the Court. In his reply

counsel for PG&E took exception to this "excursion outside the record" but also challenged the correctness of many of the statements made by Sierra's counsel. It of course is not for this Court at this time to determine the merits of these controversies. Their significance so far as this motion is concerned is that, as they go largely to the merits of the issues raised by the petition to review, they conclusively demonstrate our basic contention that the decision of those issues would require this Court not only to review and pass upon the mandate issued by the Court of Appeals for the District of Columbia Circuit under the directions of the Supreme Court and determine what was or was not decided in the decisions of those courts, but also to determine the several issues as to the extent, if any, to which the Supreme Court's opinion differed from that of the Court of Appeals, whose order the Supreme Court affirmed.

However, in order to complete the record, an affidavit is annexed hereto primarily so that this Court may have before it excerpts from the record upon which the statements made during oral argument were based. No doubt counsel for PG&E in its reply will again take issue with the conclusions drawn as to what that record may disclose, and, more particularly, as to the meaning and effect of the mandates of the Supreme Court to the Court of Appeals for the District of Columbia Circuit and of that Court of Appeals to the Federal Power Commission. If they do so, we submit that that will conclusively demonstrate that these issues can properly be determined only by the Court of Appeals for the District of Columbia Circuit.

Moreover, even if the factual disputes developed at the oral argument were not in existence, decision on PG&E's

appeal would still require a construction of the mandate of the Court of Appeals for the District of Columbia Circuit. It is our contention that the sole reason for remanding the case to the Commission was to authorize the Commission if it so desired to hold proceedings on the basis of the existing record instead of instituting a new proceeding. Such a remand gave PG&E no right to do other than request the Commission to reopen. The Commission's denial of such a request addressed to its sole discretion is in our judgment non-appealable. PG&E, on the other hand, has contended throughout that the remand required the Commission to hold further hearings and make further findings. Clearly, there is a controversy necessarily involving a construction of the remand.

CONCLUSION

The petition to review should be dismissed.

Respectfully submitted,

William C. Chanler,
Winthrop, Stimson, Putnam & Roberts,

Gregory A. Harrison,
Brobeck, Phleger & Harrison,

William C. Chanler,
Attorneys for Intervener,
Sierra Pacific Power Company.

Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing copies thereof properly addressed to:

Howard E. Wahrenbrock, Esq. (Via Air Mail),
Solicitor, Federal Power Commission,
Washington 25, D. C.

F. T. Searls, Esq. (Via Air Mail),
245 Market Street,
San Francisco 6, California.

Of Counsel,
Sierra Pacific Power Company.

December 21, 1957.

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AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WILLIAM C. CHANLER, being duly sworn, deposes and says:

I am one of the attorneys for the intervener herein, Sierra Pacific Power Company (Sierra), and make this affidavit on the basis of personal knowledge of all proceedings out of which the order sought to be set aside arises. The proceedings before the Federal Power Commission bear Docket Nos. E-6482 and E-6697, and the

opinions of the courts resulting from those proceedings are reported as *Sierra Pacific Power Co.* v. *FPC,* 223 F. 2d 605 (D.C. Cir. 1955), *modified,* 237 F. 2d 756 (1955), and *FPC* v. *Sierra Pacific Power Co.,* 350 U. S. 348 (1956), *motion denied,* 351 U. S. 946 (1956). The petitioner herein, Pacific Gas and Electric Company (PG&E) was a party to all the proceedings referred to. The Federal Power Commission is hereinafter referred to as the Commission.

As stated in the memorandum preceding this affidavit, the purpose of this affidavit is to substantiate statements made by me in the oral argument before this Court and to demonstrate that the issues on PG&E's petition to review cannot be decided without construing the mandate of the Court of Appeals for the District of Columbia Circuit in the *Sierra* case.

1. The basis of my oral statement as to the facts leading up to the original Commission order of June 17, 1954, which was disputed by opposing counsel, is contained in the opinion of the United States Court of Appeals for the District of Columbia Circuit in *Sierra Pacific Power Co.* v. *FPC, supra* at 606. In its opinion, that Court succinctly stated the facts as follows:

> "In 1938, Pacific Gas and Electric Company, a public utility under the laws of California, and Part II of the Federal Power Act, entered into its second 15-year contract to sell electric energy to Sierra Pacific Power Company, a public utility under the laws of California and Nevada. With the end of World War II, it became apparent that before expiration of this contract in 1953 Sierra's rapidly increasing demands would require either the construction of an additional transmission line into its area by P G & E, or the development of a

new source of power. Accordingly, in 1947 Sierra commenced negotiations with P G & E and the Bureau of Reclamation which offered to furnish power from Shasta Dam.

At first P G & E offered a 15-year contract at the 1938 contract rates but with an 'escalator fuel clause.' Sierra rejected this and turned to intensive negotiations with governmental agencies for 'cheap Government power.' P G & E then proposed a lower rate (the so-called P-31 schedule) for the same term without the escalator clause. This proposal was accepted in June 1948 and embodied in a contract which was duly filed with the California Public Service Commission and the Federal Power Commission. The P-31 schedule was a lower rate approved by the California Public Service Commission (formerly Railroad Commission) to enable P G & E to retain business of customers that would otherwise 'be lost altogether' to public power competition. But a significant condition of this approval was that any loss from such service would be borne by P G & E's stockholders and not by its other customers.

In 1952, however, when public power from Shasta Dam was no longer available to Sierra, P G & E sought the California Commission's approval for rate increases for Sierra and other customers under the P-31 schedule [Note 2: "With the significant exception of one city [Redding] which could still have utilized Shasta Dam power."] The Commission refused on the ground that the special contracts were entered into 'in order to forestall alleged government competition and with the clear understanding that its stockholders must bear any burden * * *.' In February 1953, in a further effort to increase its rates, P G & E filed the schedule of increased rates in question here with the Federal Power Commission under §205 of the

> Federal Power Act. Sierra thereupon intervened. It urged that §205, which provides for Commission approval of newly proposed rates merely upon a finding that they are reasonable, is not applicable where, as here, approval would effect unilateral abrogation of a duly filed rate contract; that to effect such abrogation the Commission must first make the determination, provided for in §206(a), that the rate contract to be superseded is 'unjust, unreasonable, unduly discriminatory or preferential * * *.'"

2. The authority for my statement that the California Public Utilities Commission refused to permit PG&E to increase its contract rate with Sierra in 1952 on the ground that the rate had been entered into for the purpose of meeting competition, which statement was challenged on the oral argument, is found not only in the reference thereto in the foregoing statement of the Court of Appeals for the District of Columbia Circuit, but also in the following statement of the California Public Utilities Commission in its order refusing to allow such increase:

> "Among the special resale contracts which applicant seeks to alter in this proceeding is one involving the sale of electric energy at wholesale to Sierra Pacific Power Company at the Sierra summit. The present contract, dated March 4, 1948, was approved by this Commission in Decision No. 41537. This agreement was a renegotiation of prior contracts extending as far back as 1923 covering this point of delivery. The contract covered, in addition to rate structure, other features of delivery including building of additional lines on the part of both parties and the establishment of a contract term of fifteen years to provide protection to both parties. This contract was concluded after negotiations extending over about a year's time. * * *"
>
> * * * * *

> "In connection with these special contracts, we point out that the applicant [P G & E] *in order to forestall alleged government competition,* requested authority from this Commission to enter into said contracts with the clear understanding that its stockholders must bear any burden which the applicant might sustain as a result of the operation of any such contracts. Therefore, equity calls for the treatment which we have accorded to these special contracts." (*Re* Pacific Gas & Electric Company, 96 P.U.R. (N.S.) 493, 524-526 (October 15, 1952)) (Italics added)

The foregoing order was introduced as Exhibit 17 in Docket No. E-6482 before the Commission.

3. As authority for my statement on the oral argument that the meaning of the rate contract between Sierra and PG&E had not been "left open" by the Commission and had not remained undetermined, as contended by counsel for PG&E, I refer, first, to PG&E's petition for a writ of certiorari in *FPC* v. *Sierra Pacific Power Co., supra.* In that petition, under "Questions Presented", Mr. Searls, PG&E's chief attorney in the present case, stated:

> "1. Does the rate filing procedure prescribed by Section 205 of the Federal Power Act for obtaining a rate increase apply to Petitioner's rate for electric power service to Sierra Pacific Power Company, *such rate being embodied in a contract between the two companies?"* (Italics added)

Secondly, in its opinion in the *Sierra* case the Supreme Court, after referring to the availability of power from Shasta Dam at the time of negotiation of the Sierra-PG&E contract, said:

> "To forestall the potential competition, PG&E offered Sierra a 15-year contract for power at a special low rate, which offer Sierra finally accepted in June 1948." (348 U. S. at 352)

Thirdly, the Supreme Court concluded in that opinion, on the basis of its decision reached the same day in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332 (1956), "* * * that neither PG&E's filing of the new rate nor the Commission's finding that the new rate was not unlawful was effective to change PG&E's contract with Sierra." This holding was the same as that made on the same point by the Court of Appeals for the District of Columbia Circuit in its opinion below, and it was this holding by which the Commission found itself bound in the order sought to be reviewed when it said, "* * * in our view the Supreme Court's decision in this matter must be taken as disposing of PG&E's contention concerning the contractual obligation of the parties under the 1948 contract with respect to rates". It is plain, therefore, that in asking this Court to find that the Commission erred in refusing to take parole testimony for the purpose of showing that the rate was not "embodied" in a contract and could be changed by PG&E's unilateral filing of a higher rate, PG&E is attempting to have this Court reverse a decision of the Court of Appeals for the District of Columbia Circuit and affirmed by the Supreme Court of the United States, and to have this Court force the Commission to take action that in the Commission's view would be contrary to the mandate to it from the Court of Appeals for the District of Columbia Circuit.

4. I stated at the oral argument that PG&E's petition to review herein erroneously asserted at page 4 that "The

F.P.C. determined that it was unnecessary to decide whether the contract was for a fixed or changeable rate and made no finding on that issue". There is not a word in the Commission's order of June 17, 1954 (which is set forth as Exhibit "B" to PG&E's memorandum in opposition) from which one could draw even an inference that the Commission ever made any such "determination" or was aware of the existence of such an "issue". Nor did PG&E include any request for such a "finding" in the "Requested Findings" which it submitted to the Commission before the order issued and which are set forth on pages 26-27 of Exhibit A hereto. As will be noted from an examination of those "Requested Findings", PG&E was simply asking the Commission to make the very findings which formed the basis of the reversal of the Commission's order by the courts. The contention that PG&E's principal contention before the Commission related to the meaning of the contract but that the Commission refused to make a finding on that issue is pure fiction.

The petition to review correctly states, however, that PG&E "contended that the contract rate was not meant to be fixed for the term of the contract, but was intended and understood by the parties to be subject to change if Pacific's costs of service changed, subject, of course to regulatory approval" (Pet. to Rev. p. 4). Pages 5 to 15 and 19 to 25 of Exhibit A hereto, which is a true and complete copy of PG&E's reply brief before the Commission in 1954, show the detail in which this contention was made. But as appears both from the fact the argument was primarily contained in a reply brief, and from the point headings contained therein, and as is conceded in the petition to review at page 4, this argu-

ment was not advanced as an affirmative contention but in reply to Sierra's contention that it was so well understood that the contract *did* provide for a fixed term that as a matter of equity the Commission should not permit PG&E to violate its contract, even if the Commission deemed that it had the legal right to do so.

Moreover, what the petition to review fails to state is that PG&E presented the very same contention to the Courts, which passed upon it and decided it adversely to PG&E. For example, pages 26 (middle) to 35, inclusive, of PG&E's reply brief before the Supreme Court of the United States were, with minor editorial changes, exact copies of pages 9 to 15 and 22 to 25, inclusive, of the reply brief before the Commission set forth as Exhibit A hereto. Thus the "issue" as to the meaning and intent of the contract which PG&E now seeks to raise in this Court was fully litigated and decided by the Courts in the original proceeding.

5. PG&E contends that the Supreme Court "reversed" or substantially changed the decision and mandate of the Court of Appeals for the District of Columbia Circuit and that therefore the Commission's order now sought to be reviewed was issued solely pursuant to that mandate and not that of the Court of Appeals.

The last sentence of the opinion of the Supreme Court reads as follows:

> "We shall therefore affirm the order of the Court of Appeals, with instructions to remand the case to the Federal Power Commission for such further proceedings, not inconsistent with this opinion, as the Commission may deem desirable." (350 U. S. at 355)

It is true, as urged by PG&E, that the form of this mandate differed somewhat from the last sentence of the opinion of the Court of Appeals which, was modified on Sierra's motion to read as follows:

> "For the foregoing reasons, the order under review is set aside and the case remanded to the Commission with instructions to dismiss the proceeding, without prejudice to the initiation of a new proceeding under §206(a)." (237 F. 2d at 756)

But, as indicated on the oral argument, this difference arose from the following two circumstances:

A. In referring to the Commission's statement in its order of June 17, 1954, to the effect that if it were necessary to make such a finding it would have to find "that the 1948 rate is unreasonably low and therefore unlawful", the Court of Appeals said:

> "This statement, however, is based entirely upon a record made in a proceeding under §205(e) in which the unreasonableness of the contract rate was not in issue." (223 F. 2d at 609)

The Supreme Court on the other hand pointed out that there was no such thing as a different "proceeding" under Section 205(e) or Section 206(a) of the Federal Power Act; that these sections merely set forth the powers of the Commission which the Commission could exercise in any hearing, and that therefore if the Commission had made proper findings it could have set aside the contract as against the public interest in the original proceeding, regardless of whether or not it had been commenced under Section 205(e). Accordingly, the Court of Appeals' attempt to differentiate between the two types of "proceedings" was no longer appropriate.

B. As stated at the oral argument before this Court, the undersigned agreed in the Supreme Court that the order of remand should be so drawn as to authorize the Commission to make a determination under Section 206(a) on the basis of the existing record, without the necessity of holding further hearings unless the Commission so desired. This agreement is shown in the following footnote 10 appearing in Sierra's brief in the Supreme Court at page 32:

> "PG&E and the Commission also both complain that it would be an undue burden on the parties as well as on the Commission to compel the Commission to begin all over again with a new proceeding and the taking of new testimony, under 206(a). With this contention we are in sympathy. In making our motion to amend the opinion in the Court below we had assumed that in a new proceeding initiated by the Commission under 206(a) the Commission could act on the existing record, with such additional evidence as any party might desire to add. If there is any doubt as to this, we would have no objection to the order being further amended so as to provide that the case should be remanded to the Commission 'with instructions to dismiss the proceeding under 205 without prejudice to the continuation of further proceedings under Section 206(a)' instead of expressly requiring the 'initiation of a new proceeding under Section 206(a)', as it does now. But there can be no doubt that unless the 1948 rate contract is regarded as a complete nullity, the Section 205 proceeding must be dismissed before any further steps can be taken under Section 206(a)."

But whatever the basis of the Supreme Court's action may be, I submit it is plain from the foregoing that the

resolution of this controversy depends on the extent to which, if any, the Supreme Court intended to change the decision of the Court of Appeals on the merits—despite the fact that its judgment read, "the judgment of the * * * Court of Appeals * * * is hereby, affirmed * * *". Obviously this is a controversy which should be settled in the first instance by the Court of Appeals for the District of Columbia itself.

6. In support of my contention that the issues on this appeal relate to the construction and meaning of the opinion and mandate of the Court of Appeals for the District of Columbia Circuit as the same was modified in part for the foregoing reasons by the Supreme Court, I respectfully refer this Court to PG&E's original motion before the commission to reopen the proceedings, which is the motion allegedly erroneously denied by the order here sought to be reviewed and a true copy of which is annexed hereto as Exhibit B. As will more fully appear therein, PG&E there argued that the mandate required the Commission to reopen the proceedings and, among other things, to make a retroactive determination as to whether or not the contract rate was against the public interest on June 17, 1954. It is and, ever since the decision of the Supreme Court in the principal case, has been Sierra's contention that the mandate was only permissive and gave PG&E no right whatever to any further hearings, and further, that under the express decision of the Court the Commission had no right under that mandate to make any retroactive determination. Surely this is an issue that requires a construction of the mandate as read in the light of the opinion of the Court of Appeals as affirmed by the Supreme Court.

7. I stated on the oral argument in this Court that it was my belief on the basis of certain cases cited in the motion to dismiss submitted by the Commission (*L. J. Marquis & Co.* v. *SEC,* 134 F. 2d 335 (2nd Cir. 1943); *L. J. Marquis & Co.* v. *SEC,* 134 F. 2d 822 (3rd Cir. 1943); *Columbia Oil & Gasoline Corp.* v. *SEC,* 134 F. 2d 265 (3rd Cir. 1943); *American Power & Light Co.* v. *SEC,* 325 U. S. 385 (1945)), that if either this Court or the Court of Appeals for the District of Columbia Circuit should deem that equity required that PG&E be permitted to present its petition to review before the latter Court even though the time to file such petition had expired, this could be accomplished by a transfer of the petition filed in this Court to the District of Columbia Circuit. It is true that in the Commission's motion it states that it distinguishes these cases. I submit, however, that the cases show that under proper circumstances, where equity so requires, a petition filed in the wrong circuit inadvertently but without fault can be transferred to the proper circuit even though the time for such a filing may have expired. As stated on the oral argument, if such a transfer were made or requested, I would petition the Court of Appeals for the District of Columbia Circuit to reject the petition on the ground that it appeared on the face of the petition itself that the contentions raised by PG&E are frivolous and sham and that the matters sought to be reviewed are in fact not appealable and that therefore, PG&E is not entitled to any equitable relief. I cite the cases simply to counter any suggestion by PG&E that if the present motion is granted it will be *inequitably* deprived of its day in court. If equity requires, it can still be heard in the right Circuit.

As indicated on the oral argument, on October 1st, 1957, the undersigned sent to counsel for PG&E a copy of a letter which he addressed to the Clerk of this Court asserting that this Court was without jurisdiction to entertain a review of the Commission's order, and citing cases in support thereof. A true copy of that letter is annexed as Exhibit C hereto. If PG&E in good faith wished to attempt to bring the matter here and reserve its right later to bring it before the Court of Appeals for the District of Columbia Circuit, it could of course have filed its petition for review shortly after receipt of that letter, instead of waiting until the time to file such an appeal had practically expired.

.....

William C. Chanler

Sworn to and subscribed before me on the 21st day of December, 1957.